

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA BIANCO and DEPARTMENT OF HEALTH & HUMAN SERVICES,
HEALTH CARE FINANCE ADMINISTRATION, Baltimore, MD

*Docket No. 00-383; Oral Argument Held January 17, 2002;
Issued February 13, 2002*

Appearances: *Lon C. Engel, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established her entitlement to a schedule award as a result of the March 19, 1996 work injury as alleged.

On March 19, 1996 appellant, then a 46-year-old grants management specialist, filed a traumatic injury claim alleging that the handle of a file cabinet hit her right knee in the performance of her job duties. She stopped work on March 19, 1996 and returned on December 9, 1996.

The Office of Workers' Compensation Programs accepted appellant's claim for right knee contusion and internal derangement of the right knee. The Office also authorized arthroscopic surgery with chondroplasty of the right medial femoral condyle on October 6, 1996, which found Grade 1 and 2 chondromalacia of the medial femoral condyle but no meniscus tear.

On June 24, 1997 appellant's representative requested that appellant be rated for a schedule award.

In an April 28, 1998 report, Dr. David L. Kreisberg, a Board-certified orthopedic surgeon and appellant's treating physician, filled out the Office's form of items necessary to calculate schedule awards, noting pain in the right knee after exertion, thigh aches, flexion of 110 degrees and concluded that pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 20 percent impairment of the right lower extremity.

Appellant also provided an April 29, 1997 report from Dr. Neil Novin, a Board-certified surgeon, who noted appellant's history of injury and treatment and noted that appellant had pain, weakness, loss of endurance and loss of function, with a peculiar type of radiculopathy or neuropathy of the right lower extremity. Dr. Novin concluded that, pursuant to the fourth edition of the A.M.A., *Guides*, appellant had a 24 percent impairment of the right lower extremity.

On June 22, 1998 an Office medical adviser reviewed the record and concluded that appellant had a normal range of motion, no diminished muscle function, no neurological impairment, no structural abnormalities, no arthritis and no specific diagnosis to warrant a schedule award rating.

The Office referred appellant for a second opinion examination with Dr. M.D. Chilton, a Board-certified orthopedic surgeon. In a July 24, 1998 report, Dr. Chilton noted appellant's history of treatment and injury, discussed appellant's treatment, diagnostic test results and reported his findings on physical examination. He found full range of motion with no patellar inhibition or apprehension, no effusion, no valgus or varus laxity, minimal tenderness, no instability, negative Lachman's and McMurray's tests, and that appellant walked normally. Dr. Chilton further found that the bone scan of May 23, 1996 was unremarkable and arthroscopic surgery failed to show any abnormality. He concluded that using the A.M.A., *Guides*, (4th ed. 1994), "which included consideration for pain, atrophy, loss of function, weakness and easy fatigability, there is no evidence of permanent impairment."

Accordingly, on October 9, 1998 the Office found that appellant was not entitled to a schedule award, as her right knee contusion was not severe enough to be considered ratable.

On October 19, 1998 appellant, through her representative, made a request for an oral hearing.

On June 18, 1999 appellant's representative requested a postponement, as he was going to be out of the country. He subsequently made a request for a written review of the record instead of an oral hearing.

In a June 18, 1999 additional report, Dr. Novin indicated that appellant's date of maximum medical improvement was February 1, 1997. He further opined that his percentage of impairment found in his April 29, 1997 report took into consideration his findings of pain, weakness, loss of endurance, loss of function, evidence of crepitus and was based upon the A.M.A., *Guides* (4th ed. 1994) and the operative note of Dr. Kreisberg, combined with the magnetic resonance imaging (MRI) report and the physical findings of marked tenderness in the prepatellar and patellar tendon area, as well as the weakness for extension against resistance with less notable weakness for flexion against resistance. Dr. Novin noted a definite click, normal range of motion with obvious weakness and a not quite one centimeter atrophy of the quadriceps group on the right side when compared to the left.

In a July 13, 1999 report, the Office medical adviser stated that, considering all available data including the June 18, 1999 report of Dr. Novin, "the objective medical evidence of record does not support a permanent partial impairment [rating] of the claimant's right lower extremity." He indicated that Dr. Chilton's report revealed a normal right knee range of motion

and normal ligamentus stability. The Office medical adviser also stated that “[o]ther objective tests including the MRI and bone scan are not supportive of partial impairment of the claimant’s right lower extremity.” Additionally, he stated, “[s]ubjective findings such as pain and ‘burning’ without support of credible objective medical evidence, do not warrant award of partial impairment rating.”

In a September 2, 1999 decision, the hearing representative affirmed the October 9, 1998 decision finding that appellant had no percent permanent impairment of the right lower extremity.

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence.

Section 8107 of the Federal Employees’ Compensation Act¹ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* (4th ed. 1994) as an appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.²

Appellant’s attending physicians, Drs. Kreisberg and Novin, determined that appellant had a 20 percent or 24 percent impairment of the right lower extremity.

The Office medical adviser and second opinion physician determined that appellant had a zero percentage impairment of the right lower extremity.

The record shows a disagreement between appellant’s attending physicians and the Office physicians on the issue of whether appellant has any permanent impairment of the right lower extremity.

Section 8123(a) of the Act provides in part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”³

To resolve the conflict in opinion between Drs. Kreisberg, Novin and Chilton and the Office medical adviser, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial specialist for an evaluation and opinion on whether appellant has any permanent impairment of the right lower extremity and if so, the percentage of impairment. After such further development of the evidence as may be necessary,

¹ 5 U.S.C. § 8107.

² *James J. Hjort*, 45 ECAB 595 (1994).

³ 5 U.S.C. § 8123(a).

the Office shall issue an appropriate final decision on appellant's claim for an increased schedule award.

The September 2, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development as set forth in this section.

Dated, Washington, DC
February 13, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member